No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,

Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for the Southern District of California, Central Division.
Honorable Ernest A. Tolin, Judge.

APPELLEE'S OPENING BRIEF.

AARON L. LINCOFF,
3450 Wilshire Boulevard,
Los Angeles 5, California,

GILBERT KLEIN,
608 South Hill Street,
Los Angeles 14, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

RULES

STATUTES

TEXTBOOKS

No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee

Appeal From the District Court of the United States for the Southern District of California, Central Division. Honorable Ernest A. Tolin, Judge.

APPELLEE'S OPENING BRIEF.

Prefatory Note.

In this brief, in the interest of brevity, reference to the Transcript of Record will be abbreviated "T. R.."

Statement of Jurisdiction.

This is an appeal by Deering-Milliken & Co., Inc., defendant, from a final judgment against it in the United States District Court for the Southern District of California, Central Division, docketed and entered on May 18, 1954. Jurisdiction of the within appeal therefore exists in this Court by virtue of the provisions of Title 28, *United States Code,* Sections 1291 and 2107.

Jurisdiction of the within cause existed in the trial court by virtue of Title 28, *United States Code,* Section 1332(a)(1). Plaintiff-appellee is a California corporation and defendant-appellant is a New York corporation and the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. These facts are alleged by plaintiff in paragraph I of its complaint [T. R. I, pp. 3-4], and are found to be true by the trial court in paragraph I of its Findings of Fact. [T. R. I, p. 25.]

Statement or Abstract of the Case.

Statement of Facts.

These are the elicited facts:

That on or about the 14th day of March, 1952, a written contract was made, executed and delivered by and between Appellee and the United States of America, the latter by and through the Department of the Army, under and pursuant to the terms of which Appellee agreed to manufacture and deliver a certain ordnance item, described in that contract as "LINER, (INNER), ASSEMBLY, for case, Cartridge, 105 mm, M32." The contract authorized the Appellee to produce a maximum total of 468,384 of said items, for which Appellee would be entitled to receive the sum of $70,725.98. The unit price for each of said items was fixed in the contract at $0.151. The written contract further provided that the liners were to be manufactured of rayon cloth and in accordance with certain military specification designated by the Department of the Army as PA-PD-29. These specifications set forth the specific standards of quality and manufacture which the cloth used in the manufacture of the liner would be required to meet.

Preliminary negotiations which eventually resulted in the execution of the aforesaid written contract with the United States of America had commenced on or about December 18, 1951.

Sometime during the month of January, 1952, and while the aforesaid preliminary negotiations were being carried on between the Appellee and the United States of America, Appellee and Appellant herein likewise commenced negotiations looking to the making of a contract whereby the Appellant would supply the rayon cloth needed by the Appellee for the manufacture of these liners. As a result of a series of conversations, and letters, a contract was made and executed by and between the Appellee and Appellant, whereby the Appellant would deliver to Appellee 126,000 yards of rayon cartridge cloth for the purchase price of 36⅛¢ per yard, or a total purchase price of $45,517.50. This contract provided that the aforesaid rayon cartridge cloth would be manufactured pursuant to the aforesaid military specifications, PA-PD-29, and that delivery of said cloth would start in April, 1952, and be "spread out to completion."

That throughout the negotiations had by and between the Appellee and Appellant, the latter, at all times, knew that the cloth was to be manufactured in accordance with the aforesaid military specifications; that the cloth was being purchased by the Appellee, so that it, in turn, could manufacture the liners under and pursuant to the terms of the contract which it negotiated with the United States of America, on or about the 14th day of March, 1952, as aforesaid.

That the Appellee was fully familiar with military specifications and that it had been party to contracts in-

volving the procurement of material for the United States Government, Department of the Army.

That approximately one (1) week after the execution of the contract by and between the Appellee and the United States of America, and on or about March 21, 1952, the New York office of the Appellant, by and through its representative, Mr. Lovett, sent a teletype message to its Los Angeles office, the regional manager of which was one Mr. Lee Piersol, as follows:

> "MR. LOVETT CLG, MR. PIERSOL
> RE MODERN AIRE SPEC CALLS FOR MIN POROSITY OF 35 CUBIC FT PER MIN PER SQ FOOT AND A TEST JUST COMPLETED ON OUR GREIGE CLOTH SHOWED 8.5 POROSITY WHICH DOES NOT MEET GOVT SPEC IN ORDER TO CORRECT THIS WOULD REQUIRE TOO LONG A TIME AND WE BE UNABLE TO MEET DELIVERY DO EVERYTHING POSSIBLE TO HAVE CUST ACCEPT."

Soon after receipt of the foregoing teletype message, a representative of the United States of America, Department of the Army, Los Angeles Ordnance District in Pasadena, California, called the Appellant by telephone at its New York office and there spoke with Appellant's vice-president, one J. C. Harris, and inquired of the said Mr. Harris as to the apparent inability or unwillingness of the Appellant to perform its contract with Appellee. The said Mr. Harris thereupon advised the representative of the United States Army that in order to meet the aforesaid specification PA-PD-29, it would be necessary for the Appellant to do further

processing upon said cloth, that it would cost Appellant approximately 3¢ per yard to complete such processing, and that accordingly, Appellant was no longer interested in pursuing the matter. The United States of America, by and through its authorized agencies, thereupon proceeded to and did procure the aforesaid liner from a supplier other than the Appellee, but in order to procure the same was required to and did pay the sum of $4,100.66 in excess of the price fixed in the contract by and between the Appellee and the United States of America.

Appellee's cost of production of the liners would have been $66,304.38; the contract price receivable by it as aforesaid was $70,725.98. Appellee would thus have realized a profit of $4,421.60.

As a result of Appellant's breach of contract, and the Appellee's resulting inability to perform its contract with the United States of America, as aforesaid, the United States of America served, or caused to be served, upon the Appellee, on or about the 2nd day of June, 1952, a Notice of Termination for Default in connection with the aforesaid contract dated March 14, 1952. Thereafter, to wit, on or about July 8, 1952, and pursuant to the terms and provisions of the aforesaid Notice of Termination for Default, the United States of America, Los Angeles Ordnance District, made demand upon the Appellee for the payment of the aforesaid sum of $4,100.66.

Questions Involved.

The questions before this Court are the following:

1. Is the judgment of the trial court correct?

2. Are the Findings of Fact supported by the oral and documentary evidence in the record?

To properly determine these questions requires a consideration of the following issues:

A. Was there a binding contract between Appellant and Appellee?

B. Is not the Appellant estopped to deny the existence of a contract with the Appellee?

C. Was the contract between the Appellant and the Appellee breached by the Appellee?

D. Did the Court apply the proper measure of damages?

These questions, initially made issues by the pleadings, are now raised by the contentions of the Appellant that the evidence adduced at the trial does not support the Findings and Judgment made and entered herein, and that the Honorable District Court did not follow or properly apply the law.

Counsel must at this point state that that portion of Appellant's "Statement of the Case" appearing at page 3 of Appellant's Opening Brief relative to Appellant being a manufacturer of *finished* textile products cannot be permitted to stand unchallenged or uncontroverted. Such a statement is not supported in the record, and odd it

is that Appellant does not cite a transcript reference to support its statement. The reason for such omission is apparent. The record relative to the background and activities of the Appellee is devoid of the phrase "finished textile products." [T. R. p. 117.] Appellant's indicated anxiety in emphasizing the word "finished", and the reason therefor, will become increasingly apparent as its brief is read; the nonchalant but striking manner in which it gives credence and strength to the thought of Shakespeare that "things are not really as they are" confesses the weakness of its position.

Again, and this is most significant, Plaintiff's Exhibit 11—Appellant's confession of its breach of contract—has received new treatment and a re-writing by the Appellant. A less than analytical reading of page 17 of its brief would lead one to the conclusion that Exhibit 11, the wire from one of Appellant's officers to another, contained the phrase "finished cloth." But of course the word "finished" does not appear therein.

These are the facts.

ARGUMENT AND POINTS OF LAW.

I.

The Evidence in Support of the Findings and Judgment of the Trial Court Is Sufficient, Substantial and Credible.

Appellant, anxious to persuade this Honorable Court to substitute its interpretation of the evidence for that of the trial court, has devoted all, or substantially all, of its brief to arguing the evidence, pointing out what it considers to be inconsistencies in the testimony of Appellee's witnesses, and naively presenting only the testimony of its witnesses, when in fact there is a sharp conflict in the testimony.

In its seventy-nine page effort, however, Appellant has belied its own position and given truth to that of the Appellee. Witness page 9 of Appellant's brief, wherein appears the following in part:

"Appellant further believed . . . "; and
"On the other hand, Mr. Mills (Appellee) claims . . ."

There follow references to the transcript of the testimony. What clearer acknowledgment of a conflict in the evidence could there be?

Again, observe page 11 of Appellant's brief, where the conflict in the testimony of witnesses is meticulously delineated; there follows the interpretation placed thereon by the Appellant. Unfortunately for it, however, this interpretation is not in accord with that of the Honorable Trial Court.

Appellant has completely disregarded the basic principle of law, that on appeal every intendment and presumption must be indulged in favor of the trial court's

judgment. It appears hardly necessary to state the general and long accepted rule of law with respect to the right of an Appellate Court to review conflicting evidence, which rule is as follows:

> "The Court, in reviewing conflicting evidence, will presume that the evidence in support of the verdict or findings is true, and will construe it and resolve every substantial conflict as favorably as possible in support thereof."
>
> 4 *Cal. Jur.* 2d, sec. 575, p. 449;
>
> *Estate of Chamberlain,* 44 Cal. App. 2d 193, 198.

In the case of *De La Motte v. Rucker,* 55 Cal. App. 2d 226, 229-230, Justice Moore reiterated this well established principle of law in the following language:

> "In viewing the evidence in support of a finding, it is incumbent upon the appellate Court to accept all evidence and the inferences arising therefrom which tend to establish the correctness of the finding; also, it is required to consider the evidence in its most favorable aspect toward the prevailing party; it must accept the evidence in support of the finding as true and resolve every substantial conflict as favorable to the decision of the court (2 Cal. Jur., sec. 515, p. 879) whatever may be the opinion of appellate court as to the weight of evidence. Rules followed for the guidance of juries do not control reviewing courts. If there is material credible evidence in support of the findings of the trial court, the appellate court is without power to disturb them. (*Albaugh v. Mt. Shasta Power Corp.,* 9 Cal. 2d 751, 773 (73 P. 2d 217).) All conflicts here must be resolved in favor of respondent and all legitimate, reasonable inferences must be drawn in support of the findings below. The power of the appellate court

'begins and ends with a determination as to whether there is any substantial evidence' in support of the judgment. (*Crawford v. Southern Pac. Co.*, 3 Cal. 2d 427, 429 (45 P. 2d 183).) Judgment of the trial court will not be upset because a preponderance is on the side of the losing party, but only where there is a total absence of competent evidence. (*Shapiro v. Shapiro,* 127 Cal. App. 20 (14 P. 2d 1058).) The trial judge has the sole right to believe or reject the testimony of witnesses. Although contrary findings might have been upheld, the judgment for that reason will not be disturbed." (Cases cited.)

Appellant attempts to bolster its case by pointing out some minor contradictions in the Appellee's testimony. This, in and of itself, is not sufficient to set aside the trial court's decision. It must be assumed that the trial court was well aware of the contradictions and did nevertheless determine what facts were true and who should be believed. The appellate court is bound by this determination of the trial court.

"When a verdict or vital finding is based on the testimony of one witness, and this testimony is contradictory, it will be presumed that the trier of fact found some reasonable or legal excuse for the inconsistency and had justification for concluding that upon the whole the witness told the truth."

4 *Cal. Jur.* 2d, sec. 575, pp. 448-449;

Accord: *Firth v. Southern Pacific Co.*, 44 Cal. App. 511;

Biurrun v. Elizalde, 75 Cal. App. 44.

Certain additional cardinal tenets must be here reiterated:

1. The trial court's Findings will not be disturbed if they are supported by any substantial and credible evidence.

Mitchell v. Holmes, 9 Cal. App. 2d 461, 462;
2 *Cal. Jur.* 870, 912, 913.

2. The trial court is exclusive judge of all questions of credibility of witnesses, and of the weight of the evidence.

Field v. Mollison, 50 Cal. App. 2d 585, 591;
Accord: *Estate of Rule,* 25 Cal. 2d 1.

Being mindful thereof, Appellee will, during that portion of this brief which follows immediately hereafter, refer almost exclusively to the *Appellant's own evidence* in support of the propriety and correctness of the Findings and Judgment, for such evidence is of itself ample to prove Appellee's case. But not to be disregarded is the evidence of the Appellee, which although in some respects controverted by the Appellant, was nevertheless believed by the trial court.

Thus, if the evidence is sufficient, as Appellee contends, to support the Findings and Judgment of the trial court, all other issues raised and contentions made by the Appellant must fail. Appellee respectfully submits, however, that the law, as well as the facts, supports the position of the Appellee and the judgment of the Honorable Trial Court.

II.

Appellant Deering-Milliken Is Estopped to Deny the Existence of a Valid, Binding and Enforceable Contract Between It and the Appellee in This Action.

A. The law in California is codified in Section 1962 (3), Code of Civil Procedure, as follows:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."
>
> See: *Williston on Contracts,* Vol. 5, Sec. 1508, Rev. Ed.

Blackstone has suggested the definition or rationale of the doctrine of estoppel to be a bar

> "by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged."
>
> 3 Black. Com. 308;
>
> See: *Davenport v. Stratton,* 24 Cal. 2d 232, 243.

And the doctrine is applicable whether the estoppel rests in judgment, deed, contract, or *in pais.*

> *Allen v. Hance,* 161 Cal. 189, 196.

B. The proper application of the doctrine of estoppel depends upon the existence of these four essentials:

> (a) The party to be estopped must be apprised of the facts;

(b) He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;

(c) The other party must be ignorant of the true state of facts; and

(d) He must rely upon the conduct to his injury.

10 *Cal. Jur.* 626, 627, Sec. 14;

Franke v. Claus, 121 Cal. App. 2d 777, 786-787.

It is submitted that each of the above requisites is amply satisfied in the record before this Court:

(1) At all times from the beginning of the negotiations between the Appellee and Appellant, and continuing thereafter—that is, from December 21, 1951 and thereafter, Appellant knew what the required military specifications were, and that the greige goods would not meet such specifications. Mr. Charles Lovett, the Appellant's employee in charge of this phase of Appellant's activities, so testified on direct examination by Mr. Lydick [T. R. pp. 625, 627] and yet Appellant did nothing to advise the Appellee with respect to this fact prior to the execution of the letters of confirmation dated March 6, 1952. [Pltf. Exs. 6, 7; T. R. pp. 637, 651.]

(2) Clearly Exhibit 6, signed by Mr. Lee Piersol, the Appellant's Regional Manager, was intended to induce action and conduct on the part of the Appellee and the United States Government, in reliance upon said letter. Such letter so states.

(3) At no time prior to March 6, 1952, did the Appellee know that the goods would not meet the specifica-

tions. Neither Messrs. Piersol nor Lovett did anything to apprise the Appellee of the true facts. [T. R. pp. 431, 637, 651.]

(4) That the Appellee relied on the conduct and actions of the Appellant as documented by it in Plaintiff's Exhibits 6 and 7, cannot be honestly doubted. Mr. Piersol testified that he did not intend to deceive the United States Government in the writing of Plaintiff's Exhibits 6 and 7. [T. R. pp. 510-512.] Mr. Piersol is thus entitled to the presumption, in this regard at least, that he was telling the truth. (*Code Civ. Proc.,* Sec. 1847.) So it must necessarily follow that he truthfully recited in Plaintiff's Exhibit 6 that Appellee and Appellant had consummated a contract and accordingly truthfully warranted or represented to the Appellee *and the United States Government* that they could proceed with the formalizing of their contract. [Pltf. Ex. 12.]

It is to be observed that all of these elements are established and found to be existing on the basis of the testimony of *Appellant's* witnesses. No resort need be had to any of the testimony adduced on behalf of the Appellee, although the testimony of Leonard Mills, both on direct and cross-examination, corroborates that of the Appellant's witnesses. [T. R. pp. 88-89, 93-94, 222, 228-229, 334.]

C. Appellee respectfully submits that its Complaint sufficiently pleads all of the requisite elements of an estoppel,

See: *Meadows v. Hampton Co.*, 55 Cal. App. 2d 634, 636, although the rule in California is that in a *plaintiff's* pleadings, as distinguished from those matters of *defense*

required to be affirmatively set out, estoppel need not be pleaded.

Corp. of America v. Harris, 5 Cal. App. 2d 452, 462;

McCreery v. Charlton, 185 Cal. 37.

Conceding that Appellee's Complaint is not an exemplar of a well-drawn complaint in estoppel, the record in the case at bar is devoid of a valid objection by the Appellant to the introduction of testimony by the Appellee in support of liability predicated upon the theory of estoppel. Failure so to object is a waiver of such defects in a complaint as might be found to exist.

Foster v. Fisher, 44 Cal. App. 2d 33, 37;

Woody v. Security Bank, 137 Cal. App. 29;

See: *Franke v. Claus, supra,* 121 Cal. App. 2d 786.

And the existence or non-existence of estoppel is an issue of fact for the determination of the trial court.

10 *Cal. Jur.,* Sec. 31, p. 656;

Parke v. Franciscus, 194 Cal. 284;

Gump v. Gump, 42 Cal. App. 2d 64, 69.

It is respectfully submitted that the proof of estoppel is clear, convincing and without meritorious contradiction or substantial conflict.

D. Just as one may be estopped to falsify an oral or written representation which he has asserted to be true, so may one be estopped to assert legal defenses, such as the Statute of Frauds.

10 *Cal. Jur.* p. 644, Sec. 24;

Seymour v. Oelrichs, 156 Cal. 782, 794-795.

In the latter case, which is landmark law in this jurisdiction, the Court expressed this rule in the following language which has been repeatedly adopted and quoted in cases thereafter decided:

> "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' (2 Pomeroy's Equity Jurisprudence, sec. 921.) It was said in *Glass v. Hulbert,* 102 Mass. 24, 35 (3 Am. Rep. 418): '*The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss.* In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' " (Emphasis added.)

Accord: *Williston on Contracts,* Rev. Ed., Vol. 2, Sec. 533A;

Fleming v. Dolfin, 214 Cal. 269;

Wilson v. Bailey, 8 Cal. 2d 416, 422.

III.

A Valid, Binding and Enforceable Contract Was Made, Executed and Entered Into on March 6, 1952, Said Contract Consisting of the Two Letters Dated on Said Date and Being Plaintiff's Exhibits 6 and 7 in Evidence.

A. Appellee earnestly and sincerely urges that independent of a right of recovery based upon the doctrine of estoppel, Appellee is entitled to recover upon the basis of the existence of a binding contract to buy and sell the greige goods here involved. This agreement is to be found in Plaintiff's Exhibits 6 and 7, the two letters dated March 6, 1952.

These letters contain all of the material and essential factors and items necessary to the formation of a contract to sell, namely:

(a) The buyer;

(b) The seller;

(c) The price to be paid;

(d) The time and manner of payment; and

(e) The property to be transferred, describing it so it may be identified.

King v. Stanley, 32 Cal. 2d 584, 589;
O'Donnell v. Lutter, 68 Cal. App. 2d 376, 381;
Grafton v. Cummings, 99 U. S. 100, 106.

The law with respect to the manner in which a contract to sell may be made or formed is to be found in

Section 1723, Civil Code of California, reading as follows:

> "Subject to the provisions of this act and of any statute in that behalf, a contract to sell may be made in writing (either with or without sale), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred by the conduct of the parties."

It is submitted that this Court will not give sympathetic ear to any contention that an agreement of sale and purchase can be evidenced only by a formal contract drawn with technical exactness. A memorandum of the agreement is sufficient and this may be found in one paper or in several documents, *or in a letter from the vendor to the purchaser which is accepted and acted upon by the latter.*

De Rutte v. Muldrow, 16 Cal. 505;

See: *King v. Stanley, supra,* 32 Cal. 2d 588.

Wherein do Plaintiff's Exhibits 6 and 7 fail to meet the tests prescribed by these authorities?

Is it to be contended by the Appellant that these letters are insufficient memoranda to satisfy the Statute of Frauds (Sec. 1624a Civ. Code) as it meekly suggested during the trial of this action? [T. R. p. 253.] If so, wherein do these exhibits not constitute a "note or memorandum in writing of the contract or sale . . . signed by the party to be charged or his agent in that behalf?"

See: *Murphy v. Munsen,* 95 Cal. App. 2d 306, wherein in a case in many respects analogous to the situation at bar, a judgment by the trial court in favor of the party defendant pleading the defense of the Statute of Frauds

was reversed with directions to enter Judgment in favor of the plaintiff.

Is it to be seriously asserted by the Appellant that Mr. Piersol, the man who signed every document in evidence bearing his signature over the designation "Regional Manager" and who, on several occasions to be hereinafter designated, contradicted his own testimony previously given on the question of agency and authority, was not, in the language of Section 1624a of the Civil Code, Appellant's "agent in that behalf?"

Is it to be contended by the Appellant that Mr. Mills had not, in the language of Section 1624a (3) of the Civil Code expressed "by words and conduct his assent to becoming the owner of those specific goods" and thus rendered Appellee liable in damages if delivery thereof had been proffered by the defendant?

The testimony of Mr. McEwen called on behalf of the Appellant certainly indicates that the Appellant considered the Appellee to have been bound to a contract and that a deposit was thus required so that in the event that the Appellee did not fulfill the contract, it might be held liable out of that deposit for such loss as the Appellant might sustain. [T. R. p. 661.]

Even if these contentions, or any of them, be accepted by the Court, is not the defendant estopped to rely on the Statute of Frauds?

See: *Seymour v. Oerlichs, supra,* 156 Cal. 782.

Is it to be contended by the Appellant, and with serious countenance, that Plaintiff's Exhibits 6 and 7 were but preliminary negotiations to be treated only as a suggested outline of a contract to be later drawn? If so,

why use the word "contract?" [Ex. 7.] If so, why acknowledge that it [Ex. 6] was intended to be submitted to the government procurement office? If so, why not state that a "sales note" or other formally drawn contract shall constitute the only agreement of the parties? If so, why not state that these letters merely constitute an offer?

King v. Stanley, supra, 32 Cal. 2d 584, 591;

O'Donnell v. Lutter, supra, 68 Cal. App. 2d 376, 383.

Or is Appellant to contend that there was some fatal uncertainty in these letters because thereafter one width was agreed upon instead of two. [T. R. pp. 256, 519.] Although there is testimony elicited from Appellant's Mr. Piersol under *direct examination* that on or about February 21, 1952—*long before* Plaintiff's Exhibits 6 and 7 were written—the possibility of a single width was discussed. [T. R. p. 470] yet for the purpose of argument, it will be assumed that the single width was not finally agreed upon until after March 6, 1952. If this be a contention upon which Appellant elects to rely, its merit cannot long stand in the face of settled authority.

Such a contention rests, of course, upon the theory that by virtue of such change from two widths of cloth to one, the parties indicated that on March 6, 1952, the subject matter of the contract was uncertain. If such be the theory, it finds no support in the law of California. In fact, if the letters of March 6, 1952, Plaintiff's Exhibits 6 and 7, had themselves provided that Appellee had the option to later change from two widths to one width, such provision would not have rendered them invalid as a binding contract.

B. In nearly every instance, an agreement sued upon that has given the buyer an election or opportunity to select the goods specified in the contract of sale from a general grouping or classification has been sustained and considered by the courts to be sufficiently definite and mutual as to be enforceable.

> *Windsor Manufacturing Co. v. S. Makransky & Sons,* 322 Pa. 466, 186 Atl. 84; 105 A. L. R. 1096.

In the cited case, two writings had been exchanged between the parties. One was dated August 29, 1933, entitled a "Purchase Memorandum," while the other, under date of August 21, 1933, was termed an "Acknowledgment of Order." These documents were alleged to constitute a valid and definitive contract. They contained, among other things, a provision affording to the buyer an election to make selection of the style of fabrics from the samples to be submitted approximately six weeks after the date of these documents. The Court said (105 A. L. R. 1099) the following:

> "The total quantity of goods was settled, and the price per yard fixed; any differential in price being ascertainable at the time of the submission of samples. . . . It is clear to us and the principle is well sustained by authority, that existence of an election within prescribed limits exercisable by one party to a contract does not vitiate a contract for uncertainty."

California is in accord with the rule expressed in the cited case.

In *Hylton Flour Mills, Inc. v. Bowen,* 128 Cal. App. 711, a written agreement provided among other things

that the buyer should be permitted a choice of brands of flour. The seller contended that this made the agreement invalid for uncertainty. The Court said, at page 714, the following:

> "The above quoted language of the contract states that plaintiff 'sells' and defendant 'buys.' The quantity is definite. The time within which shipment is to be made is fixed. The terms of payment are set forth. It is true that the buyer is permitted a choice of five different brands. This circumstance, however, does not alter the fact that he has specifically agreed to purchase a definite quantity of flour within a certain fixed period of time. The discretion permitted the purchaser as to the quality or brand of flour to be selected by him did not introduce such an element of uncertainty as would invalidate the contract. (*Mebius & Drescher Co. v. Mills,* 150 Cal. 229 (88 Pac. 917)."

Accord: *Mebius & Co. v. Mills,* 150 Cal. 229;

McIllmoil v. Frawley Motors, 190 Cal. 546.

In the *McIllmoil* case, the Court held that the subject matter of the contract and the price to be paid therefor, were not matters left for future agreement and that the mere fact that the buyer might thereafter select the model of the car he wanted, did not make the contract uncertain. And further that the selection by the plaintiff of the car desired determined the price and made the contract definite in that respect also.

In the *Mebius* case, the Court said that even though the particular quality of the salt to be selected between several varieties carried by the dealer was not stipulated in the contract, the contract was still valid and not uncertain. The Court held that the maximum quantity de-

liverable was fixed and that merely because a certain discretion as to quality was allowed, this did not invalidate the contract for uncertainty. The Court pointed out that such uncertainty as may have existed was at once relieved when the choice was exercised and so held that the matter falls within the rule that "that is certain which can be made certain." (See: Sec. 3538, Civ. Code of California.)

A fortiori, under these authorities, an *agreed* change from two widths to one should cause less doubt.

(1) The law does not favor but leans against the destruction of contracts because of uncertainty; it will, if feasible, so construe agreements as to carry into effect the reasonable intention of the parties if it can be ascertained.

McIllmoil v. Frawley Motor Co., supra, 190 Cal. 546, at 549;

Roy v. Salisbury, 21 Cal. 2d 176, 184;

Mancuso v. Krackov, 110 Cal. App. 2d 113, 115-116.

The language of the last cited case is particularly appropriate. There the Court said, at pages 115-116, as follows:

> "While it is essential that the mutual assent of the parties to the terms of the contract must be sufficiently definite to enable the court to ascertain what they are (citation), nevertheless, it is not necessary that each term be spelled out in minute detail. It is only that the essentials of the contract must be agreed upon and *be ascertainable.* (Citation.) The law does not favor the destruction of contracts on the ground of indefiniteness, and if it be feasible,

> the court will so construe the agreement as to carry into effect the reasonable intentions of the parties if they can be ascertained. (Citation.) Furthermore, it is a well established principle of law that that which can be made certain is certain. (Citations.)" (Emphasis added.)

It is respectfully submitted that all of the requisite elements of a contract are present and are delineated with sufficient certainty so as to constitute the letters [Pltf. Exs. 6 and 7] a valid, binding and enforceable contract.

See: 12 *Cal. Jur.* 2d, Sec. 109, p. 313.

(2) It is, of course, to be observed that this action was not and is not one for specific performance. The rule is that the degree of exactness necessary to entitle one to a decree for specific performance need not exist in order to entitle one to recover damages for breach of such contract.

Stanton v. Singleton, 126 Cal. 657.

(3) The law of California requires that a contract receive such an interpretation as will make it definite and capable of being carried into effect, if it can be done without violating the intentions of the parties.

Sec. 1643, Civ. Code of California.

Such rule is further to be found in the Restatement of Contracts, Section 32, where as Comment *C* is to be found the following:

> "Offers which are originally too indefinite may later acquire precision and become valid offers by

the subsequent words and acts of the offeror or his assent to words or acts of the offeree."

Marin Water and Power Co. v. Sausalito, 168 Cal. 587.

Appellee earnestly contends that the determination made on or about March 14, 1952, to supply the goods in one width instead of two, was a valid and operative modification of the contract expressed in the letters of March 6, 1952 [Pltf. Exs. 6 and 7] and hence removed whatever uncertainty might have been theretofore existent. Such determination made prior to the execution of the memorandum of order [Pltf. Ex. 8; T. R. p. 519] was accepted and acted upon by the Appellee and Appellant by virtue of Appellant's executing said Exhibit 8 and Appellee executing its contract with the government. These acts, in the language of the Restatement of Contracts above cited, constitute "subsequent words or acts of the offeror" and "assent to words or acts of the offeree."

These acts serve a second and thus dual purpose, for they also bring the parties within the rule that a written contract may be modified by an oral agreement which has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it.

12 *Am. Jur.* p. 1007, Sec. 428; p. 987, Sec. 407;

12 *Cal. Jur.* 2d 402, Sec. 184;

Wilson v. Bailey, supra, 8 Cal. 2d 416.

Apropos of the contract and the certainty thereof, counsel is constrained to invite the Court's attention to the following evidence, all of which stands without challenge in the record:

(a) In the course of the long and meticulous examination of Leonard Mills, extending from page 111 to page 328 of the Transcript of Record, and resuming again at page 567 and continuing to page 616, counsel for the Appellant elicited the fact that all of the terms which were finally formalized in the letters of March 6, 1952 [Pltf. Exs. 6 and 7] had been discussed.

(b) In the examination of Mr. Piersol, under Rule 43b of Federal Rules of Civil Procedure, it was established that all of the terms, including the fact that at all times in using the phrase "in the greige" Mr. Piersol meant "as the goods came off the loom," were discussed prior to the writing of the letters of March 6th. As Mr. Piersol states [T. R. p. 358]:

> "I believe that those questions (terms, shipment, delivery) were discussed to some extent almost every time we discussed yardage."

Terms had been discussed even prior to January 16, 1952. [T. R. p. 363.]

As to the matter of the meaning of "in the greige," Mr. Piersol acknowledged "greige goods means that goods as they come off the loom." [T. R. p. 348.]

(c) Counsel suggests that the comment of Appellant's counsel that the real basis for this misunderstanding

grows out of the entire lack of understanding of Mr. Mills about an industry he knows nothing about, is interesting. [T. R. p. 219.] Counsel for the Appellee would venture the thought that the only misunderstanding that ever arose or existed pertained to the meaning of the phrase "in the greige." Appellant's counsel was likewise considerably concerned with Mr. Mills' understanding of that term, for on no less than thirteen separate occasions during the cross-examination of Mr. Mills, Mr. Lydick asked questions to elicit from Mr. Mills the latter's definition of the phrase "in the greige," and on each of these occasions, he said: "It means as it comes off the loom." [T. R. pp. 165, 166, 168, 169, 170, 172, 176.] In addition to Mr. Lydick's inquiry, the Court inquired of Mr. Mills as to the latter's understanding of the phrase. The Court's inquiry appears at [T. R. pp. 172, 173]. This understanding and interpretation of the phrase is in complete accord with the understanding and definition of the phrase given by every witness called on behalf of the Appellant, and who was questioned in that matter. Mr. Piersol so testified [T. R. p. 348]; Mr. Charles Lovett so testified [T. R. p. 621]; Mr. Frank B. McNeil so testified [T. R. p. 688]. Mr. Piersol acknowledged that throughout the whole negotiations, the parties talked of "greige goods" [T. R. p. 522], and that Mr. Mills never told him that he (Mr. Mills) desired finished goods. [T. R. p. 546.] Certainly if Mr. Mills knew nothing else about the textile industry, he knew the precise and correct definition and meaning of the very heart and subject

matter of the contract, that is, "greige goods." So if there was any misunderstanding, it is suggested that it was one to which the Appellee was not a party. Certainly there was no misunderstanding as to all of the terms of the contract. All of the matters were clearly understood, determined and acknowledged prior to the execution of Plaintiff's Exhibits 6 and 7 on March 6, 1952. Counsel for the appellee, although perhaps somewhat inartistically, finally managed to have Mr. Piersol explain the chronology of certain events and documents prior to March 6, 1952. [T. R. pp. 386, 393-394.] These documents are Plaintiff's Exhibits 22, 23, 24, 25, 26, 27 and 28. The significant thing, and such significance cannot be underestimated, is that Exhibit 22 (a teletype message from Mr. Piersol to Mr. Lovett) contains the precise terms later to be found in Plaintiff's Exhibits 6 and 7. Exhibits 23, 24, 25 and 26, all sent during the period March 5 and March 6, 1952, clarify whatever misunderstanding Appellant's New York and Los Angeles offices might have had with the *eventual result that the acceptance of the order precisely as proposed and set forth in Plaintiff's Exhibit 22 was given.*

And it was only after receipt of all of these exhibits [Exs. 22-26, incl.] that Mr. Piersol wrote the letters of March 6, 1952, Plaintiff's Exhibits 6 and 7. [T. R. p. 394.] Under what stretch of the imagination could one argue that there was any uncertainty with respect to the understanding of the parties at the time that Plaintiff's Exhibits 6 and 7 were being dictated?

IV.

Appellee Was Not Under a Duty to Mitigate or Minimize Its Damages, for Such Duty Does Not Require an Aggrieved Party to Assume the Burden Which the Adverse Wrongdoer Has Violated, or to Incur Relatively Large Expense on That Account.

8 *Cal. Jur.* 782, Sec. 43;

Dutra v. Cabral, 80 Cal. App. 2d 114, 122;

Chambers v. Belmore Land & Water Co., 33 Cal. App. 78;

Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 491;

Ash v. Soo Sing Lung, 177 Cal. 356;

See: *Schultz v. Town of Lakeport,* 5 Cal. 2d 377, 384.

A. The law is well established that in an action for damages, the plaintiff has the burden of establishing the damages which result from the defendant's tortious act or his breach of contract, *but that insofar as it may be contended that the damages might and should have been minimized by taking steps to reduce the resulting damages or prevent the accrual of damages, the burden of proof rests upon the defendant.*

15 *Am. Jur.* p. 770, Sec. 371;

Dutra v. Cabral, supra, 80 Cal. App. 2d 114, at 121;

Downs v. Sherry, 90 Cal. App. 2d 1, 6;

Steelduct Co. v. Henger-Seltzer, 26 Cal. 2d 634, 654;

See: *Ozmo Oil Co. v. Cotton & Co.* (C. C. A. 9th), 278 Fed. 722.

It is submitted that the Appellant has neither assumed, carried, nor discharged this burden. In all of the Appellant's evidence, both oral and documentary, there is but one attempted showing with respect to a price at which the Appellee might have obtained goods elsewhere [Deft. Ex. Z], and yet an examination of this exhibit immediately reveals that it cannot furnish a fair basis for determining the extent to which damages might have been minimized. Primarily, the widths of cloth therein referred to—30½ inch and 36½ inch—do not correspond with the widths for which the Appellee and Appellant had negotiated and contracted—45½ inch and 47½ inch. Secondly, Exhibit Z is concerned with finished cloth and not with greige goods, and the testimony is patently clear that at no time prior to March 21, 1952, did Mr. Mills and Mr. Piersol tell each other that it was finished goods that was desired by Mr. Mills, or that it was finished goods that Deering-Milliken intended to furnish. [T. R. pp. 424, 431, 537, 545, 546.]

B. The only evidence relative to the cost of procuring similar goods elsewhere is to be found in the testimony adduced on behalf of the plaintiff. Mr. Mills testified that he had ascertained from the representative of Paul Whitin Co., another supplier of such goods, that the additional cost for *just the first shipment of those goods —a total of 20,000 yards*—would be $1,600.00 and that he so advised Mr. Piersol. [T. R. pp. 103, 283.] Further, Mr. Mills testified that he had ascertained that the goods *in toto* would cost approximately $10,000.00 additional,

and that there was no assurance as to the time in which the plaintiff would be able to secure the goods. [T. R. pp. 104, 292.] His testimony in this respect is borne out by the contents of Plaintiff's Exhibits 15 and 16. An arithmetical computation will show that the added cost of the goods, if procured from J. P. Stevens & Co., Inc. [Ex. 15] would be approximately $9,057.00; if procured from Iselin-Jefferson Company, Inc. [Ex. 16] such added cost would be approximately $7,225.00. And aside from the item of added cost, delivery of the goods could not be made as required by the schedule set therefor by the agency of the United States Government therein involved.

A proper application of the law to this evidence compels the conclusion that a duty to minimize or mitigate damages would not require such expenditures by the Appellee.

Dutra v. Cabral, supra, 80 Cal. App. 2d 114, at p. 122, wherein the Court said as follows:

> "It is true that it is the duty of an aggrieved party to exercise reasonable care to minimize anticipated damages growing out of the breach of a contract. *But, ordinarily, it is not the duty of a party to a contract to assume the burden which the adverse wrongdoer has violated, nor to incur relatively large expenses on that account.* (Citations.) Where the cost of procuring water from a source other than that which is contemplated by the contract is relatively large as compared with the damages sustained, the California cases have held that the failure to thus minimize damages will not warrant the reversal of a judgment in favor of the aggrieved party." (Emphasis added.)

In the *Dutra* case, plaintiff sued for breach of an oral crop-lease, charging that the defendant's failure to supply a well and to pump water for necessary irrigation of the crop caused crop failure. The Court found that plaintiff's total damages were $3,115.60. It was held that the plaintiff would have had to make an unreasonable outlay of cost, time and labor in procuring water and hence the judgment in favor of the plaintiff would not be reversed for failure to minimize damages under such circumstances.

Accord: *Chambers v. Belmore Land & Water Co.,* 33 Cal. App. 78, wherein the Court found that if the defendant, the lessor, had constructed a dam which the lease required of him to do, plaintiff, the lessee, would have realized crops of the value of $5,078.55. The Court further found that plaintiff would have been required to expend approximately $2,000.00 to build the dam and it was concluded that the rule requiring mitigation of damages did not require such a large expenditure, and hence was inapplicable in the case.

> See: *Coulter v. Sausalito Bay Water Co., supra,* 122 Cal. App. 480, at 491.

It is respectfully submitted that to have required Appellee to spend an amount equal to its entire profit would impose an unreasonable requirement and duty.

Valencia v. Shell Oil Co., 23 Cal. 2d 840, 846, wherein the Court said as follows:

> "The duty to minimize damages does not require an injured person to do what is unreasonable or

impracticable and, consequently, when expenditures are necessary for minimization of damages *the duty does not run to a person who is financially unable to make such expenditures.* (Citing cases.)" (Emphasis added.)

Query: Under the rule above stated, as to the burden of proof in matters of litigation, was not the Appellant required to show Appellee's financial ability to pay these added costs?

C. Appellant has contended that the Appellee could have reduced his loss of profit by having the goods finished at a cost of three cents (3¢) per yard. [T. R. pp. 316, 485, 562.]

Aside from an additional delay of two weeks which would result from applying a finishing process to the goods [T. R. p. 485] and the consequence therefrom that delivery in accordance with the schedule fixed by the agency of the United States Government would be rendered impossible [T. R. p. 313], it is submitted that under the authorities cited, it was not the duty of the Appellee to assume the burden which the defendant had violated, that is, to furnish goods which, among other things, would meet the porosity requirement of Specification PA-PD-29.

Dutra v. Cabral, supra, 80 Cal. App. 2d 122;
8 *Cal. Jur., supra,* at p. 782.

V.

Appellant Deering-Milliken Is Subject to Liability Upon the Contract Made by Its Regional Manager, Mr. Lee Piersol.

A. It is respectfully submitted that Appellant cannot escape liability on the ground that Mr. Piersol was not authorized to conduct and conclude negotiations with the Appellee. Such liability can be easily predicated on any of the following three bases:

(a) actual authority;

(b) apparent or ostensible authority;

(c) agency by estoppel.

See: *Rest of Agency,* Vol. 1, Sec. 140.

1. Actual authority is defined in Section 2316 of the Civil Code of California, as follows:

> "*Actual authority, what.* Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

Appellee urges that it must be held that Lee Piersol had actual authority to conduct the negotiations with the Appellee on behalf of the Appellant, and to subject the latter to liability. The transcript amply supports the conclusion that Lee Piersol had been permitted to believe that he possessed such actual authority. It is to be observed that on examination of Mr. Piersol, under Rule 43(b) Federal Rules of Civil Procedure, he testified that he did not have the final decision on "lots of things that go through my office." [T. R. p. 339.] However, it is submitted that in this respect at least, the credibility and veracity of Mr. Piersol has been completely impeached.

Such impeachment is demonstrated at pages 338 and 339 of the Transcript, wherein appears portions of the deposition of Mr. Piersol, taken on March 31, 1953, and April 2, 1953, and where appear the following statements by Mr. Piersol:

> "Q. And final decisions, such as they may be with respect to business in the local office, are made by you? A. Yes, sir.
>
> Q. You are the gentleman with the so-called final say on all matters having to do with the conduct of the local office, is that correct? A. That is correct.
>
> Q. And that has been the case since 1943 up to date? A. Yes."

Certainly such statements indicate that Mr. Piersol did not know of or believe that there were any limitations on his authority. And nowhere in the transcript is there one iota of testimony by any of those superior in authority to Mr. Piersol reflecting any lack of actual authority in him.

Further, it was not the duty of the plaintiff to prove the actual authority of Mr. Piersol to contract on behalf of the defendant.

Morton v. Kohler & Chase, 70 Cal. App. 458, wherein, at page 461, the Court said as follows:

> "The argument that plaintiff was required to prove the actual authority of the piano salesman to make the contract for the defendant is also without merit. The persons with whom plaintiff dealt were placed in the store of defendant for the purpose of dealing with customers in regard to pianos. They certainly had ostensible authority, upon which the plaintiff was entitled to rely. Defendant is con-

tending for a rule which would seriously embarrass it in the conduct of its business, for if each person who deals with the Kohler & Chase Company must pause and ascertain the exact scope of the authority of the salesman negotiating the transaction, we apprehend that the trouble and uncertainty involved will cause a material decrease in the number of transactions."

B. Again and by the same token, can there be any doubt that Mr. Piersol had ostensible authority to act for and subject the Appellant to liability? Such authority is also defined in our statutes.

Sec. 2317, Civ. Code.

"Sec. 2317. *Ostensible authority what.* Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

The extent of one's authority is, of course, a question of fact.

1 *Cal. Jur.* p. 716, Sec. 21;

Correa v. Quality Motor Co., 118 Cal. App. 2d 246, 251.

How glaring do these facts stand out in the record of this case:

(a) Every document bearing the signature of Mr. Piersol, other than Appellant's intra-office communications, are over the designation "Regional Manager," which Mr. Piersol testified was his official capacity. [T. R. p. 339.]

(b) Nothing appears in the record to the effect that Appellant ever advised the Appellee that Mr. Piersol was without authority to act on behalf of the Appellant.

(c) All of Appellant's intra-office communications, particularly Defendant's Exhibits 19-30, inclusive, reveal that Appellant's New York office was permitting and had permitted Mr. Piersol to conduct *all phases and details* of the negotiations.

(d) The Appellee, through Mr. Mills, relied on the conduct of Mr. Piersol, and upon the situation which the Appellant's New York office thus permitted to appear and exist as to Mr. Piersol's authority, and plaintiff acted in accordance with such reliance.

Secs. 2300-2334, Civ. Code:

See: *County First National Bank v. Coast Dairies,* 46 Cal. App. 2d 355, 366.

The rationale of the doctrine of liability based upon ostensible or apparent authority has been recently stated in the case of *Correa v. Quality Motor Co., supra,* 118 Cal. App. 2d, at pp. 252-253, as follows:

> " 'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.' (Citations.) In *Safeway Stores v. King Lbr. Co.,* 45 Cal. App. 2d 17, 23 (113 P. 2d 483), it is said that, 'Where a principal makes it possible through his acts, for his agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent where his own conduct has invited those dealing with him to assume that the agent possessed such authority. In such a case, a principal is bound by his acts and is estopped by his own conduct from denying the authority of the agent to act.' And as this Court

said in *Gaine v. Austin,* 58 Cal. App. 2d 250, 260 (136 P. 2d 584), 'Agency may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power.' . . . For as is said in *Carter v. Rowley,* 59 Cal. App. 486, 489 (211 Pac. 267): 'As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transactions to put the purchaser on notice that the agent is exceeding his authority.' "

Accord: *Carstens Packing Co. v. Miller,* 10 Cal. App. 2d 48, 50;

Sauble v. Gary Southcoast Agency, 56 Cal. App. 606, 611-612;

See: *McKee v. Mires,* 110 Cal. App. 2d 517, 521.

The conclusion seems inescapable that the case at bar falls within the purview of this doctrine.

C. As to the liability of the Appellant predicated on the doctrine of estoppel, it is submitted that the authorities hereinabove cited in support of Appellee's contention that Appellant is estopped to deny its liability on contract [Pltf. Exs. 6 and 7] are fully applicable as authority in support of Appellee's contention that the Appellant is estopped to deny that Mr. Piersol had actual, as well as ostensible authority to act and contract on Appellant's behalf.

VI.

Appellee Is Entitled to Recover the Loss of Profits Suffered by Virtue of Defendant's Non-performance of the Contract.

Sec. 3300, Civ. Code;

Noble v. Tweedy, 90 Cal. App. 2d 738, 745;

Western Industries Co. v. Mason Malt Whiskey Co., 56 Cal. App. 355, 364;

Williston on Contracts, Sec. 1356;

Patty v. Berryman, 95 Cal. App. 2d 159, 171;

Hadley v. Baxendale, 9 Exch. 341.

A. The law is well established that where there are special circumstances made known to a seller at or before the making of a contract, from which it might reasonably have been foreseen that non-delivery by the seller will, in turn, cause a breach of the buyer's contract with a customer, and the two contracts are in fact breached, the damages recoverable from the seller who is in default, are the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated.

House Grain Co. v. Finerman, 116 Cal. App. 2d 483, 495, 497;

Patty v. Berryman, supra, 95 Cal. App. 2d 159, at p. 171;

Hacker etc. Co. v. Chapman Co., 17 Cal. App. 2d 265, 267-268.

In effect, this rule is that where there is knowledge of these special circumstances, the parties are deemed to have contracted on the terms of being liable if the seller

forced the purchaser to a breach of the latter's contract with a customer.

See: *Grebert-Borgnis v. Nugent,* 15 Q. B. Div. 85;

Accord: *Booth v. Spuyten Mill Co.,* 60 N. Y. 487, 494;

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543.

B. *A fortiori,* the rule must follow that where a seller is properly chargeable with knowledge and notice of the resale by the purchaser and knows that the goods are intended to fulfill a resale contract, the special damages recoverable for the breach of the principal contract include loss of profits which would have been gained by the buyer under the resale contract had the seller performed his agreement. This rule finds support in the leading case of:

Messmore v. New York Shot and Lead Co., 40 N. Y. 422, wherein the Court, after expressing the general rule as to the measure of damages, said the following:

> ". . . and is changed when the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such contract and the vendor agrees to supply the article to enable him to fulfill the same, because those profits *which would accrue to the purchaser upon fulfilling the contract of resale may justly be said to have entered into the contemplation of the parties in making the contract."* (Emphasis added.)

The courts of California have expresed approval of this rule in the recent case of:

Beatty v. Oakland Sheet Metal Co., 111 Cal. App. 2d 53, 67.

See:

Patty v. Berryman, supra, 95 Cal. App. 2d at 171.

Accord:

Western Industries Co. v. Mason Malt Whiskey Co., supra, 56 Cal. App. 355 at 364.

Can there be any doubt in the case at bar that the Appellant at all times from the commencement of negotiations with the Appellee knew the purpose for which the goods were being purchased, and that they were being purchased so as to comply with United States Government specifications, that they were to be used in the manufacturing of ordnance material, and that they could only be resold to the United States Government by a contract executed in accordance with the law?

The transcript is replete with testimony out of the mouths of Appellant's own witnesses that they knew all of these matters from the very commencement of negotiations, that is December 21, 1951, and thereafter. [T. R. pp. 449, 544, 554-555, 562-563, 623-624, 627, 356, 376-377, 296, 672-673.]

C. It is further the law that the liability of a seller in case of a breach by him to reimburse a buyer for losses sustained through non-performance of a contract of resale is not conditioned upon the existence of the resale contract at the moment of the execution of the original contract; it may arise where the seller has knowledge that such a contract is in the contemplation of the buyer.

Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 N. Y. Supp. 71;

Matter of Casualty Co. of America, 250 N. Y. 410, 165 N. E. 829;

Williston on Contracts, Sec. 1347.

D. It has also been held that where a seller has notice of the resale or the intended resale, the right to recover for loss of profits on such resale is not affected by the fact that such resale was not mentioned in the contract of sale.

Howard Supply Co. v. Wells (C. C. A. 6th), 176 Fed. 512;

Rogers-Morgan Co. v. Webb, 34 Ga. App. 424, 130 S. E. 78.

See:

Ozmo Oil Refining Co. v. Cotton Oil Co. (C. C. A. 9th), 278 Fed. 722.

By the same token, it is not necessary as a condition precedent to the recovery of lost profits that the seller know the resale price or the amount of the purchaser's profit at the time of the making of the original contract of sale.

Sedro Veneer Co. v. Swapil, 113 Pac. 1100;

Edwards Manufacturing Co. v. Bradford Co. (C. C. A. 2d), 294 Fed. 176, 182-183;

Delafield v. A. K. Armsby, supra, 116 N. Y. Supp. 71, aff'd 92 N. E. 1082;

Standard Pipe and Supply Co. v. Oil State Supply Co., 145 Okla. 143, 292 Pac. 12;

Martin v. Neer, 269 Pac. 342.

E. And finally there is law in support of plaintiff's claim to an award in the sum of $4,100.66, this being the amount claimed by the United States Government for

breach of the contract between the government and the plaintiff herein. [Pltf. Exs. 10, 13 and 14.]

House Grain v. Finerman, supra, 116 Cal. App. 2d 485, 497;

Buckbee v. P. Hohenadel Co. (C. C. A. 7th), 224 Fed 14;

In the case of *House Grain v. Finerman,* cited above, the facts were substantially similar to those in the case at bar. In the cited case the damages was not a fixed liability in the sense that a third party had imposed an obligation by legal action for the payment thereof. So too, in the case at bar, the sum of $4,100.66 is an item for which a claim seems clearly to have been established by the government of the United States. It is interesting that the Appellant, in its opening brief, at page 72, concedes that the cited case is ample authority for the recovery of the said sum of $4,100.66.

F. The Appellant has misconstrued the theory upon which the Appellee seeks a recovery for loss of profits. Such recovery is based not upon the difference between the contract price and the market value of certain goods, but rather simply upon the difference between the price at which Appellee was to receive goods from the Appellant, and the price at which these goods would have been sold to the Government, less the cost of production, with the resultant net profit. The authorities cited by the Appellant are valid only in a case where the measure of damages is the ordinary one, to-wit, the difference between the contract price and the market value of goods. (See,

Buyer v. Mercury T. C. & F. Co., 92 N. E. 2d 896, 20 A. L. R. 2d 815-8.) Thus, the absence of a Finding as to the availability or non-availability of these goods in the open market is immaterial, for the measure of damages is based upon that portion of the language of Section 3300 of the Civil Code, reading as follows:

> "For the breach of an obligation arising from contract the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby . . ."

Accord:

Grupe v. Glick, 26 Cal. 2d 680, 690-691.

In summary, the evidence is clear that Appellee had a contract with the United States Government under which Appellee would have been paid the sum of $70,725.98. [Pltf. Ex. 12.]

It is further established that the cost of producing the liners would have been $66,304.38. Thus, plaintiff would have realized a profit of $4,421.60, which together with the sum of $4,100.66 is the proper measure of damages under the authorities above cited.

VII.

Appellant Had It Within Its Power to Call Witnesses Who Might Disprove Appellee's Testimony as to Its Negotiations With the Appellant, but Failed so to Do; It Is Presumed, Therefore, That If Such Witnesses Had Been Produced, Their Testimony Would Support Appellee's Case.

Hays v. Viscome, 122 Cal. App. 2d 135, 139;
Bone v. Hayes, 154 Cal. 759, 765.

In the latter case, the rule is enunciated as follows:

> "It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary."

Accord:

Freitas v. Peerless Stages, Inc., 108 Cal. App. 2d 749, 761;
Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 397-398.

A. Appellee suggests that there was one person, an officer of the Appellant, whose testimony could have shed great and revealing light on this controversy. This person was J. C. Harris, Vice-President of the Appellant. [T. R. p. 430.] It was he who could have cast the illumination of truth on these questions:

1. Did the New York office of the Appellant act in a manner that was consistent with its contention that there was no contract between Appellee and Appellant.

2. What limitations, if any, had been placed on the actual authority of Mr. Piersol?

3. Why was Appellee never advised until after March 21, 1952, that the goods would require further finishing, especially in the light of Mr. Lovett's testimony that the Appellant knew as early as December, 1951, that the goods would not meet the specifications "in the greige"? [T. R. p. 627.]

4. Why, if it was always known to the Appellant that the goods "in the greige" would not meet the specifications, was it necessary to run the "test just completed" [Pltf. Ex. 11] to ascertain whether the goods in the greige would meet the porosity specifications of PA-PD-29?

5. Upon what basis could Appellant reconcile its claim that Appellee knew what further finishing would be required with the contents of Defendant's Exhibit L, which indicated that government inspectors would inspect the goods at the mill and *with Mr. Piersol's testimony that he understood that such inspection was for the purpose of seeing whether the goods met the specifications?* [T. R. pp. 553-554.]

B. Furthermore, the testimony of Mr. Howard B. Drake, an Ordnance Department employee at all times pertinent to this case, wherein he related his conversation with Mr. J. C. Harris, stands without contradiction in the record. [T. R. p. 485.]

It is submitted that this testimony is susceptible of but one interpretation—that the Appellant well knew that it had not performed according to the terms of the contract with the Appellee. If Mr. Harris could have testified honestly that there was no agreement with the Appellant at the time of the sending of Plaintiff's Exhibit 11, or

that Appellee had been told that there was no contract until a formal "sales note" was drawn, or that Appellee had been told that further finishing was required, would defendant not have produced Mr. Harris, or could not Mr. Harris simply have told Mr. Drake that it made no difference what Deering-Milliken proposed to do, since it was not bound to furnish any goods? Would this not have been a logical answer to Mr. Drake if such was indeed the fact?

After all, this is the crux and heart of the Appellant's defense—that there was no contract. Appellant has certainly failed to pump any life's blood into that defense, when Mr. Harris might well have done so.

It is to be observed that the Appellant produced Mr. McEwen from New York. [T. R. pp. 656, 662.]

It is to be observed that the defendant produced Mr. Lovett—twice—from New York. [T. R. pp. 616, 674.]

Where was Mr. Harris?

It would seem to be crystal clear, therefore, that the presumption announced in the case of *Bone v. Hays, supra,* 154 Cal. at p. 756, is properly invoked in the case at bar, and, accordingly, that had Mr. Harris been called upon to testify, he would have supported Appellee's position.

Conclusion.

Appellee sincerely urges that the authorities hereinabove cited, and the argument hereinabove presented, fully support Appellee's position and fully substantiate Appellee's right to recovery.

Appellee has studiously avoided a reference to the testimony of Mr. Mills, except perhaps in the matter of

corroborating defendant's testimony. Every proposition presented by Appellee finds support in cited references in the transcript, to testimony adduced by the Appellant. In fact, no consideration whatever need be given to the testimony of Mr. Mills for it is submitted that Appellee's case has been made out in the testimony and documentary evidence given and produced by the Appellant.

Counsel for the plaintiff has in fact labored strenuously and diligently to keep at the safest permissible minimum the length and breadth of this brief. The process of appraising and reappraising the relative value of the myriad of items of evidence has not been a simple one.

Except in one instance, Appellee has studiously refrained from raising the issue of the truth and veracity of Appellant's witnesses. This is no admission or suggestion that the truth and veracity of the Appellant's witnesses, particularly Mr. Piersol, may not be impeached by references to the transcript. Appellee is content to rest upon the merits and upon the law.

Appellee earnestly and sincerely submits to this Honorable Court that the Judgment of the Honorable District Court should be affirmed.

Respectfully submitted,

Aaron L. Lincoff and
Gilbert Klein,
By Aaron L. Lincoff,
Attorneys for Appellee.

Dated: January 18, 1955.